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IN THE

Supreme Court of the United States

October Term, 1947.

~~58 Miscellaneous.~~

COMMONWEALTH OF PENNSYLVANIA ex rel.
FRANCIS JOSEPH GRYGER

v.

C. J. BURKE, WARDEN EASTERN STATE PENITENTIARY, PHILADELPHIA, PENNSYLVANIA.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

JOHN H. MAURER,
District Attorney,
666 City Hall,
Philadelphia 7, Pennsylvania,
Attorney for Respondent.

Martin & Lyle, 817 Walnut Bldg., Phila. 2, Pa.

INDEX

PAGE

Answer of John H. Maurer, District Attorney, to the Petition of Francis Joseph Gryger for Writ of Certiorari 1

Argument 8

CITATIONS

Barr v. State, 187 N. E. 259 (Ind. 1933) 11

Carlesi v. New York, 233 U. S. 51 12

Commonwealth v. Ferrone, 96 Conn. 160 11

Commonwealth ex rel. Foster v. Ashe, 336 Pa. 238 9

Commonwealth v. Sutton, 125 Pa. Super. Ct. 407 10

Commonwealth ex rel. Wall v. Smith, 345 Pa. 512 10

Laws of Pennsylvania:

Act of Assembly April 29, 1929, P. L. 854 1

Act of Assembly June 24, 1939, P. L. 872 §5108 1

Act of Assembly June 19, 1911, P. L. 1055 10

Act of Assembly June 22, 1931, P. L. 862 10

McDonald v. Mass., 180 U. S. 311 12

ANSWER OF JOHN H. MAURER, DISTRICT ATTORNEY, TO PETITION OF FRANCIS JOSEPH GRYGER FOR WRIT OF CERTIORARI.

The relator was proceeded against as a fourth offender after the last conviction which was a plea of guilty entered July 7, 1943 to eleven indictments charging burglary, and as the same was a fourth conviction, under the laws of Pennsylvania was sentenced to life imprisonment. The law of Pennsylvania sentencing a person to life imprisonment as a fourth offender was originally passed April 29, 1929, P. L. 854 and was re-enacted in the Penal Code of 1939 passed June 24, 1939, P. L. 872, §1108, 18 P. S. §5108, as follows:

"(a) Whoever after having been convicted within or without this Commonwealth of the crime, or attempt to commit the crime, of treason, murder, voluntary manslaughter, sodomy, buggery, burglary, entering with intent to steal, robbery, arson, mayhem, kidnapping, sale of narcotics, perjury, abortion, pandering, incest, or any offense committed or attempted to be committed through the instrumentality of or with the aid of a deadly weapon or gunpowder or other explosive substance or corrosive fluid, may, upon conviction of any of such crimes for a second offense committed within five (5) years after the first offense, or subsequent offense committed within five (5) years after the prior offense, be sentenced to imprisonment for a term, the maximum of which shall not be more than twice the longest term prescribed upon a first conviction of the crime in question.

"(b) Whoever, after having been three (3) times convicted, within or without this Commonwealth, of crimes of the character set forth in clause (a) of this section, or of attempt to commit any such crimes, shall,

upon conviction of any such crimes for a fourth or subsequent offense, committed within five (5) years after the prior offense, be sentenced, in the discretion of the judge trying the case, to imprisonment in a state penitentiary for the term of his natural life.

"(c) In computing the period of time between convictions, as provided in clauses (a) and (b) of this section, any period of servitude by a person in a penal institution, within or without this Commonwealth, shall not be included in the computation of any of said five-year periods. It is hereby declared that the intent of said clauses is that said five-year periods shall run only during the time any such person shall be at liberty.

"(d) If at any time within two (2) years, either after conviction or sentence, it shall appear that a person convicted of any of the crimes set forth in clause (a) of this section has previously been convicted of any such crimes three (3) or more times, it shall be the duty of the district attorney of the county in which the last conviction was had to file a complaint accusing the said person of such previous convictions, and to serve a copy of such information upon the defendant thirty (30) days before taking any further proceedings in court as hereinafter set forth. Thereupon the court in which the last conviction was had shall cause the said person, whether confined in prison penitentiary, or otherwise, to be brought before it, and shall inform him of the allegations contained in such complaint and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such complaint or not. If he says he is not the same person, or refuses to answer, or remains silent, his plea or the fact of his silence shall be entered on record, and a jury shall be empanelled to inquire whether the offender is

the same person mentioned in the several records as set forth in such complaint. If the jury finds that he is the same person, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he is the same person, the court may sentence him to imprisonment for life as prescribed in clause (b) of this section, and shall vacate any previous sentence notwithstanding that the term of court in which the last sentence was imposed may have expired. Such sentence shall be reviewable on appeal by the Supreme or Superior Courts, not only as to alleged legal errors but also as to the justice thereof. Where any such defendant is indigent, the costs of appeal, together with reasonable counsel fee, shall be paid by the Commonwealth. Whenever it shall become known to any warden, or prison, probation, parole or police officer, or other peace officer that any person charged with, or convicted of, crime has been previously convicted, within the meaning of this section, it shall become his duty forthwith to report the facts to the district attorney of the county.

"(e) A person need not be formally indicted and convicted as a previous offender in order to be sentenced under this section."

The two important things to create a fourth offender are:

(a) The commission of one of the enumerated crimes, and

(b) The commission of a new crime within five years after the prior offense. The five years * * * are calculated during the time the person is at liberty and does not include time in jail.

1. The relator was convicted of burglary on March 17, 1927 in Maryland and sentenced to one year in the House of Correction from March 17, 1929, and was discharged therefrom January 17, 1928.

2. He was convicted of burglary in Philadelphia County April 1929 and sentenced to the Huntingdon Reformatory, and discharged therefrom on September 20, 1930.

3. In November 1930, the relator plead guilty to robbery being armed with a weapon, and sentenced to not less than five nor more than ten years in the Eastern State Penitentiary from which he was discharged on parole May 28, 1936.

4. In April of 1937 he was indicted for burglary and receiving stolen goods, and plead guilty to receiving stolen goods, and was sentenced April 1937 to not less than eighteen months nor more than three years in Eastern State Penitentiary at the expiration of his unexpired parole sentence imposed in November of 1930, and was paroled from said institution April 29, 1943. Receiving stolen goods is not one of the crimes, but it prevented the running of the five year period.

5. In June of 1943 he was indicted and convicted of burglary and sentenced to not less than five nor more than ten years at the expiration of his unexpired parole time. Thereafter, in May 1944, an Information as required by the Act of Assembly, namely in the nature of an indictment setting forth the four prior convictions of burglary and robbery, was presented against the defendant, and on a hearing in open court he plead guilty to the same by stating that he was one and the same person who had been found guilty in each and every one of the alleged offenses although sometimes under different names or aliases. The testimony and proof of the convictions were presented to the court and after hearing he was sentenced to life imprisonment.

The relator then filed a petition with the Supreme Court of Pennsylvania as of Miscellaneous Docket No. 8, No. 301, asking for a writ of habeas corpus to discharge him on the

ground that he was improperly convicted as a fourth offender, which was dismissed October 1, 1945 with a short Per Curiam opinion as follows:

> "Even assuming for present purposes the verity of the petitioner's averments as well as the merit of his legal contention that the sentence imposed on him by the Court of Quarter Sessions of Philadelphia County on November 27, 1944, as a fourth offender, was in error, his petition for a writ of habeas corpus to relieve him from that sentence is premature. He is at present confined in the Eastern Penitentiary under prior sentences which are not attacked and which will not expire at the earliest until February 25, 1949. He is therefore now validly restrained of his liberty. Consequently his petition for habeas corpus must be denied. See *Commonwealth ex rel. Toliver v. Ashe, Warden*, 336 Pa. 206, 208, 8 A. 2d 541, cert. den., 311 U. S. 646; *Commonwealth ex rel. Lewis v. Ashe, Warden*, 335 Pa. 575, 576, 7 A. 2d 296, cert. den., 308 U. S. 596; also *Commonwealth ex rel. Sloan v. Ashe*, Warden, 133 Pa. Superior Ct. 32, 38, 1 A. 2d 788."

A similar petition was filed shortly thereafter in the Superior Court of Pennsylvania, Miscellaneous Docket No. 5, No. 398 which was dismissed January 17, 1946 following the opinion of our Supreme Court.

Thereafter, on March 21, 1947, the relator filed another petition for writ of habeas corpus in Supreme Court of Pennsylvania as of Miscellaneous Docket No. 8, No. 448, which was dismissed on April 14, 1947.

Thereafter, on May 10, 1947, the relator filed another petition for writ of habeas corpus in Supreme Court of Pennsylvania which on May 28, 1947 was dismissed by the Supreme Court on an order as set forth in the relator's petition, page 4.

Thereafter, in July of 1947, the relator filed a petition for writ of habeas corpus in United States District Court for

the Eastern District of Pennsylvania, which was dismissed on July 10, 1947 in order by Honorable Pierson M. Hall, as follows:

> "From the petition it appears that the Supreme Court of Pennsylvania denied a similar petition for Writ of Habeas Corpus on April 14, 1947. From the oral response to the order to show cause it appears that a petition for Writ of Habeas Corpus was denied by the Supreme Court of Pennsylvania on May 28, 1947. The petitioner contends that the latter did not raise the same issues as the instant one. Regardless of whether that is so or not, the time for appeal to the Supreme Court of the United States (28 U. S. C. 350) has not expired on the petition denied by the Supreme Court of Pennsylvania on April 14, 1947. The Petitioner has therefore not exhausted his state remedies by such appeal and hence under authority of Ex parte Hawke 321 U. S. 114 the Petition must be and is
>
> Denied 7/10/47
>
> Pierson M. Hall,
> J."

from which no appeal was taken.

At no time did the relator attempt to ask for counsel to take an appeal or to take an appeal to either the Superior or Supreme Court from his conviction as a fourth offender as provided by the Act:

> "If the jury finds that he is the same person, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he is the same person, the court may sentence him to imprisonment for life as prescribed in clause (b) of this section, and shall vacate any previous sentence notwithstanding that the term of court in which the last sentence was imposed may have expired. Such sentence shall be reviewable on appeal by the Supreme or Superior Courts, not only

as to alleged legal errors but also as to the justice thereof. Where any such defendant is indigent, the costs of appeal, together with reasonable counsel fee, shall be paid by the Commonwealth."

1. The relator contends that he was not properly tried as a fourth offender in that the paper making such allegation is called, in accordance with the words of the Act of Assembly, "an information" whereas in fact and in truth it is in the nature of an indictment; sets forth all the facts, and a copy must be served upon the defendant personally thirty days before further proceedings in court. The information alleging that Gryger was a fourth offender was served on the defendant on May 5, 1944 and he was not called before the Bar of the Court to be tried on the matter until November 28, 1944.

2. The relator was convicted of burglary under Bill No. 461 of June Sessions, 1943, and a sentence of five to ten years for burglary is a proper sentence.

3. On November 27, 1944, in open court, the information, charging the defendant as a fourth offender, was read in toto to the defendant. He was then asked whether he was the same person, and stated that he was. Thereupon there were offered in evidence the various convictions to show that he had committed each one of the felonies within five years of the time he was at liberty after each prior felony. The defendant then stated he did not understand why in the world Judge McDevitt when he gave him the last five to ten years sentence had not then sentenced him to life imprisonment. The Court then explained fully to him that the proceedings were taken according to law, that he was guilty, and sentenced him to life imprisonment.

JOHN H. MAURER,
District Attorney of Philadelphia County.

Commonwealth of Pennsylvania
City and County of Philadelphia } ss.

John H. Maurer, being duly sworn according to law, deposes and says that he is District Attorney of Philadelphia County, and that the facts set forth in the foregoing answer are true and correct according to the best of his knowledge, information and belief.

JOHN H. MAURER.

Sworn to and subscribed before me this 13th day of November, A. D. 1947.

CHARLES B. WATTS,
(Seal) Notary Public.
My Commission Expires February 21, 1951.

ARGUMENT.

The fourth offender law of Pennsylvania was enacted by the Act of April 29, 1929, P. L. 854 which was re-enacted in the 1939 Criminal Code Act June 24, 1939, P. L. 872, Sec. 1108, 18 P. S. §5108.

The main complaint of the relator-appellant is that he was sentenced to life imprisonment as a fourth offender, and that such a sentence was under an ex post facto law because three of the convictions were prior to its passage. In that claim he is in error. The first offense of which he was guilty was prior to the passing of the Fourth Offender Law. The other offenses were afterward.

The reason for giving a person who is a fourth offender life imprisonment is because he refuses to be a good citizen, and continues to commit crimes. This relator always

committed a new crime within a year after his release on parole.

Increased punishment for second, third and fourth offenders is not new. It is not the creation of a new crime, but merely the provision of the Legislature that greater punishment may and should be given to habitual criminals. Such has been the law in Pennsylvania since the Act of March 31, 1860, Sec. 182, P. L. 382 for second offenders. Since 1929, one who has been convicted four times of certain designated felonies, or attempts to commit the same, may be sentenced to life imprisonment upon the facts being proved in an open hearing, and sentence imposed for the last felony revoked. Such a law is not ex post facto because it would have to be passed prior to the commission of the fourth felony, which was true in this case.

Sentence for crime is for a threefold purpose: EXEMPLARY, PUNITIVE and CORRECTIVE. One not impressed by penal servitude in any of the three ways, but who almost immediately upon his release commits another felony, must be classed as an habitual criminal against whom society is entitled to be protected.

Our Act of 1929 provides that the crimes must be committed within five years after prisoner has been released, so that the Legislature recognized that it was dealing solely with habitual criminals and not with those who were making an honest attempt to rehabilitate themselves, but had fallen by the wayside.

Commonwealth ex rel. Foster v. Ashe, 336 Pa. 238.

The relator was sentenced in Erie County on May 19, 1930 for a term of three to six years. On April 29, 1932 an information was filed by the District Attorney of that county enumerating a long list of prior crimes of which relator was convicted. On October 11, 1932, the former sentence was revoked and the relator was sentenced to imprisonment for life in accordance with the Act of 1929. The relator there claimed that the previous crimes set forth in

the information had been committed prior to the Act of 1929, had been committed outside of the State and that they were within the knowledge of the sentencing judge who sentenced him in 1930 to three to six years. They were all overruled. The Court said as follows, page 240:

> "All of these objections overlook the fact that the statute provides merely for the punishment of a crime, committed within the State and after the passage of the Act, by making the sentence greater if the defendant had committed previous offenses. It is not the previous crimes upon which the defendant is again indicted, tried or sentenced, but they are taken into consideration only in order to determine the punishment to be imposed for the crime then under consideration, it being a well known principle of penology that an habitual criminal should receive a more severe sentence than a first offender."

Our appellate courts have been very strict in the interpretation of the Fourth Offender Act.

Commonwealth v. Sutton, 125 Super. Ct. 407.

It was there held that the fourth offense must be an offense committed after the third conviction. If a man commits ten felonies and has not been tried and convicted for any one of them, he is only a first offender, and cannot be considered a second, third or fourth offender under our law.

A somewhat similar situation arose in reference to the Act of June 19, 1911, P. L. 1055 as amended June 22, 1931, P. L. 862. See *Commonwealth ex rel. Wall v. Smith,* 345 Pa. 512.

Wall claimed that he was sentenced in 1930, and after release from jail and commission of another crime, he could not be compelled to serve all of his back time without commutation as provided in the amendment, but that the ser-

vice of back time was under the original Act of 1911. The Court said, page 515:

> "Even if there had been no such act prior to 1931, this relator could be lawfully imprisoned as a parole violator under the later act, because by the crime he committed while on parole in 1937, he subjected himself to the penalties then in force, which were imprisonment according to the sentence imposed for the 1937 crime, and recommitment to the penitentiary for breach of the conditions on which he had been released on parole."

Many decisions in the U. S. Supreme Court and other Federal and State Courts have uniformly held that such laws are not ex post facto.

Barr v. State, 187 N. E. 259 (Ind. 1933).

This case caused the writing of an article in the *Indiana Law Journal Vol. 9*, p. 534, which most fully analyses the habitual criminal statutes.

In the case of Barr v. State supra, the defendant was indicted in one bill for the substantive crime and also as a prior convict. In a joint trial he was convicted on both charges and sentenced as an habitual criminal. The article concludes that such a joint indictment and trial are proper.

However, in *Commonwealth v. Ferrone*, 96 Conn. 160, an opposite view is taken.

The indictment may contain both the substantive crime and the prior conviction. In such a case the prisoner must be arraigned, not in the presence of the jury, on the whole indictment. The jury shall then try on the substantive crime, without being informed of the prior conviction. If convicted, then the jury shall try as to the prior conviction.

In Pennsylvania, the defendant must be convicted of the substantive crime. After conviction, a new proceeding is brought charging him as a fourth offender. Upon that fact

being determined either upon confession,—as here—,or on conviction by a jury, the sentence imposed for the fourth conviction is revoked and the offender sentenced to life imprisonment.

The right to give a more severe sentence to habitual criminals has been sustained by your Honorable Court.

McDonald v. Mass., 180 U. S. 311.

The Court said:

> "The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.
>
> "But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another state, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal."

Carlesi v. New York, 233 U. S. 51.

This case involved the question of an additional sentence because the defendant was a second offender. Following the case of McDonald v. Mass., supra, it was held that such a statute is not ex post facto as it does not impose a punishment for past crimes, but only for future crimes.

It is, therefore, clear that the fourth offender Acts are not ex post facto, that the habitual offender is not punished for his past offenses but is punished for his last offense, the punishment for which is increased because of the fact that he is an habitual criminal.

This relator's prior punishments made no impression upon him. He made no attempt to rehabilitate himself. Within

a year, and latterly a couple of months, after release he immediately committed another crime. He confessed he was a fourth offender when arraigned and does not now deny it. He was properly sentenced under the Fourth Offender Act of Pennsylvania.

We pray that the petition for certiorari be dismissed.

Respectfully submitted,

JOHN H. MAURER,
District Attorney.